United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2006

To Be Argued By
DAVID L. BIRCH

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2006

UNITED STATES OF AMERICA ex rel. JULIUS FULLER,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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Preliminary Statement

Petitioner-Appellant appeals from a decision of the United States District Court for the Southern District of New York (Cannella, J.) denying without a hearing petitioner-appellant's application for a writ of habeas corpus. On January 7, 1975, this Court granted petitioner-appellant a certificate of probable cause.

Questions Presented

Is petitioner's reliance on the contention that his confession was involuntary precluded because he deliberately bypassed his State remedies in not challenging the confession at trial or in any other proceedings?

Statement of Facts

Petitioner-appellant ("petitioner") is presently incarcerated in the Auburn Correctional Facility, Auburn, New York, pursuant to a judgment of conviction for rape in the first degree amd impairing the morals of a minor entered by the Supreme Court, Bronx County (McCaffrey, J.) after a trial by jury. Petitioner was sentenced on April 10, 1967, as a second felony offender, to a term of from ten to twelve years. The conviction was affirmed by the Appellate Division, 28 A D 2d 1208 (1st Dept., 1967) and by the Court of Appeals, 22 N Y 2d 658 (1968).

The prior conviction for manslaughter in the first degree, at issue here on this appeal, was rendered on November 8, 1956 by the County Court, Bronx County (Schulz, J.) after a trial by jury. Petitioner was sentenced to a term of from ten to twenty years. The conviction was affirmed by the Appellate Division, 9 A D 2d 877 (1st Dept., 1959) (Valente, J., dissenting) and by the Court of Appeals, 8 N Y 2d 866 (1960). Two prior trials had resulted in jury disagreements.

The petitioner was represented by Herbert S. Siegal, Esq., at the three trials.* Mr. Siegel was assisted by two attorneys at the third trial, Arnold Schildhaus, Esq. (T. 129)** and Arthur Layton, Esq. (T. 286, 605). On appeal, petitioner was represented by Samuel Segal and Philip Segal.

The Crime

On December 26, 1953, petitioner met Mrs. Elise Johnson and two of her acquaintances, Allan Lewis and Ruth Baker, at a bar in the Bronx. At sometime after 6:00 p.m., the four left the bar and went to Mrs. Johnson's apartment where they

* See Minutes of Sentence, pp. 3-4 included in Appellant's Supplemental Appendix.

** Numbers proceeded by "T" refer to trial transcript, a copy of which is supplied to the Court.

had a drink. Approximately one-half hour later Mr. Lewis and Miss Baker left leaving petitioner at the apartment door. Petitioner struck and killed Mrs. Johnson with an iron bar after engaging in sexual foreplay with her.

The Trial

Dr. Edward Santura, an assistant medical examiner and the first witness, testified that Mrs. Johnson died of a scalp laceration, a fracture of the skull, and marked cerebral hemorrhage (T. 33). He further testified that an iron bar, later demonstrated to be part of Mrs. Johnson's police lock, fitted into the fracture and was the instrument that caused Mrs. Johnson's death (T. 34-35). Dr. Santura estimated the time of death as late evening of December 26, 1953 (T. 103, 181).

Dr. Alexander Wiener, bacteriologist and serologist, testified that Mrs. Johnson's blood and that found on petitioner's overcoat were of the same type (T. 191) and that semen was found on the outside of petitioner's pants (T. 192).

Allan Lewis and Ruth Baker testified to the events in the bar, their short trip to Mrs. Johnson's apartment and their visit there (T. 199-212, 244-250). As Mr. Lewis and Miss Baker

were leaving, Mrs. Johnson told petitioner to leave, too (T. 214, 253). The last time that Mr. Lewis and Miss Baker saw the petitioner he was in the door of Mrs. Johnson's apartment (T. 215, 254). On cross-examination, Mr. Lewis testified that petitioner said to Mrs. Johnson as they were leaving, "I want to speak to you for a moment" (T. 241).

Patrolman Howard Williams testified that he found the body of Mrs. Johnson in her apartment about 5:00 a.m., on December 27, 1953 (T. 275-75) with the fox lock bar lying across her waist, her skirt raised up the higher part of her thigh, her stockings down and her girdle hanging from one of her stockings (T. 277).

At this point in the trial, both sides conceded that Detective Michael Cleary was out of the state and would not return (T. 286). They consented to reading his testimony from an earlier trial.

> "MR. SIEGAL: So conceded. We concede the testimony was given as will be read, but we do not, of course, concede the truth or falsity of any part of it.
>
> "THE COURT: All right.
>
> "MR. SIEGAL: And we consent that it be read". (T. 286).

Detective Cleary testified that the first time he talked with petitioner was at 3:00 p.m., on December 28, 1953. He questioned him about a dry cleaning ticket found on him. Petitioner told the Detective that he had left some clothes at a dry cleaners (T. 288). Detective Cleary went to several dry cleaners and eventually located petitioner's clothes (T. 288). He returned to the precinct with them at 6:00 p.m. (T. 289) and petitioner identified the clothes as his own (T. 290). The detective talked to the petitioner for about an hour but he would not answer any question (T. 290). Detective Cleary then testified to the statements made by petitioner to him at that time (T. 290-294). The statements were not made until petitioner spoke with his wife (T. 290). Petitioner admitted to striking Mrs. Johnson with the iron bar but claimed it was in self-defense. At this time, the people introduced into evidence a note written on December 28, 1953 by the petitioner to his wife in which he alluded to his commission of the crime. Petitioner's counsel made no objection to the introduction of this testimony and consented to the introduction of petitioner's note to his wife as an exhibit of the prosecution (T. 293). The note was read to the jury (T. 293-94).

Detective Cleary was extensively cross-examined by petitioner's counsel (T. 297-306). The bulk of the cross-examination consisted of counsel's reiterating, through his questions and the witness's replies, petitioner's exculpatory story of his having been sexually enticed by the victim, his having ejaculated, and his striking the victim in self-defense.

Detective Larry Squires* testified that he approached the petitioner at noon on December 28, 1953 in front of the apartment building where petitioner lived (T. 319-20, 322). They arrived at the precinct at approximately 12:30 - 12:45 p.m. (T. 324). The detective questioned petitioner until 6:00 and returned at approximately 8:30 (T. 325). The detective then testified to the statements made to him by the petitioner, essentially the same exculpatory story as testified to by Detective Cleary (T. 326-328). Petitioner's counsel made no objection to the introduction to this testimony.**

* Detective Squires was on an early shift since he was already on duty by 5:10 a.m., on December 26, 1953, which is most likely the reason he needed a nap at 6:30 p.m. on December 28 and not because of the intensity of his interrogation of the petitioner as concluded by petitioner (petitioner's brief, p. 16).

** Petitioner, of course, did not take the stand on a voir dire to challenge the voluntary nature of these statements testified to by Detectives Cleary and Squires although petitioner could have done so without taking the stand in his own defense. Petitioner apparently took the stand at one of his previous trials. See 9 A D 2d 878.

The cross-examination of Detective Squires covers 170 pages of trial transcript (T. 330-400). Again, counsel did not cross-examine about any alleged coercive nature of the circumstances surrounding the statements, but rather, used the detective to elicit the petitioner's alibi: the sexual enticement of the victim, his ejaculating* and his striking the victim in self-defense, see particularly (T. 374-382, 388-91, 399-400).

The police photographer testified (T. 404-09) and the victim's husband (T. 412-424). On cross-examination, counsel attempted unsuccessfully to elicit from the victim's husband that they had had a plan to rob the petitioner the evening of the killing (T. 472-73).

* In his opening statement to the jury, petitioner's counsel argued:

> "And the testimony is going to show that. . .they started to make love, if you please, and he is correct when he says that the medical examiner or the serologist, Dr. Wiener, is going to testify that they found semen inside of his trousers.
>
> "Now, then, having found semen inside of the trousers, we say that the testimony is going to prove unquestionably there was no intent to rape, because there was nothing there, as you gentlemen know. He had his; it was over. Why the rape? (T. 22)

Jacob Israel, the police stenographer then testified. As he was about to read from his stenographic notes the statement made by petitioner to the police the following interchange occurred:

> [The District Attorney]: "Will you please read from your notes?
> A. Statement taken at the 41st precinct.
>
> "MR. SIEGAL: If Your Honor please, at this time I most respectfully move to strike out the word 'statement'.
>
> "THE COURT: Overruled.
>
> "MR. SIEGAL: Exception. May I most respectfully submit to Your Honor that under the code of the laws of the State of New York this is not a statement, it is merely a recording of an oral conversation between the District Attorney and the defendant.
>
> "THE COURT: Overruled.
>
> "MR. SIEGAL: May I most respectfully submit to Your Honor that under the law of the State of New York, a statement must be signed and sworn to.
>
> "THE COURT: Overruled.
>
> "MR. SIEGAL: Exception". (T. 483)

No objection was made on the grounds of involuntariness. The stenographer then read the questions put to petitioner and his answers (T. 484-94). Petitioner's account was essentially the same as that testified to earlier by the two detectives; being invited to the victim's house, having a few drinks, sexual foreplay, the petitioner's ejaculating, an argument, and his striking her in self-defense.

During cross-examination, counsel insinuated that the minutes had been tampered with but asked no questions concerning the voluntariness of petitioner's answer (T. 494-504).

Petitioner's counsel then moved to dismiss the indictment for failure to establish a prima facie case and for a directed verdict. He argued:

> ". . .now, if we examine the record, we find that the only proof in this case with respect to any killing or possible killing comes from the lips of the defendant in telling his story to a policy officer. Now, that came in the people's case. They have established, the people have established that the killing, if there was a killing, was justifiable or excusable. They have

not established that it was not justifiable or excusable. . . .I submit, most respectfully, that the record as it now stands, as adduced by the District Attorney, establishes, that the killing was justifiable or excusable and that there is not one iota of evidence in this record in addition to that testimony as brought out by Squires as coming from the lips of this witness, the defendant.

"THE COURT: Motion denied.

"MR. SIEGAL: I most respectfully except. I most respectfully move to dismiss upon the ground that the People failed to prove the criminal act in this case. The only testimony in this case at this minute, People having rested, is the testimony that the defendant said he struck the woman with one or two blows. Period. . .

"THE COURT: Motion denied.

"MR. SIEGAL: Exception. I most respectfully move to dismiss upon the ground that there is no confession in this case. There is nothing in this case, certainly by way of the stenographer, Mr. Israel, and there is nothing in this case as to Squires, wherein this defendant admits killing anyone. What is admission is that he struck this woman once or twice justifiably because he was being attacked. That is the entire state of this record, and for that reason I most respectfully ask Your Honor to dismiss". (T. 507-509).

Petitioner presented three witnesses through whose testimony he attempted to demonstrate that he had received a considerable amount of money a short time before the killing (T. 512-539). This testimony was struck out by order of the court.

The summations were not transcribed (T. 540-541) except for those parts of the prosecution's summation to which petitioner's counsel objected. Counsel objected when the prosecutor called petitioner's statements a confession (T. 544). Petitioner's counsel then continually objected when the prosecutor called the petitioner's statement a confession and when the prosecutor attempted to read from the stenographer's minutes of that statement since it had never been introduced into evidence (T. 549-555).

Four of petitioner's requests to charge explicitly relied on his version of the events as told to the detective:

> "3. That in the heat of passion specified in Section 1050, subdivision 2 does not mean a sexual passion but any condition of the defendant's mind wherein as he is so enraged that his good judgment is impaired". (T. 597).

"19. The jury is instructed that when a slayer is facing a weapon directed at the defendant possessing potential imminent death the yardstick of judgment to be employed by the slayer is not one embracing reflected choice or judicial niceties but is to be measured in the sense that the slayer is facing certainly an assailant who has chosen the barbaric laws of the jungle". (T. 601).

"22. In a prosecution for manslaughter where the defendant pleads he acts in self-defense the defendant need not show that he had reasonable ground for apprehending a design to take his life as part of the defense that was justified in committing the homicide. For the burden of proof is not upon the defendant to establish the pleas of self-defense but merely his duty to produce the proof which he relies on as showing his defense. And the proof can come from any witness on the stand". (emphasis supplied) (T. 602).

"26. The jury is instructed that in the event that they believe that the defendant was being assaulted by the deceased that:
1. The slayer is not required to retreat but is permitting to stand his ground.
2. That the slayer is not required to use every available means of equipment.
3. That the slayer is not required to reflect or meditate in the presence of an uplifted or directed weapon at the slayer". (T. 603).

In its charge to the jury, the Court's description of petitioner's defense was constructed from what petitioner told the detectives and about which the detectives testified:

> "Then there was a concession as to the testimony of Detective Michael Cleary, retired, that he had a conversation with Fuller relative to a dry cleaning ticket at the Champion Dry Cleaners. He got a suit and coat. Fuller said they were his. He called his wife from the police station. He said he had been drinking at the 845 Club and went to an apartment with another couple. They had a few drinks. Elise Johnson asked him to stay. They were fooling around in the doorway. He dropped his hat. The girl had the bar. She dropped it, and he struck her once or twice; and the iron bar, People's Exhibit 4, is taken in evidence. He wrote a note at the police station which becomes People's Exhibit No. 5, and this leads me, in view of that statement by the defendant, to the theory of self-defense (T. 581-82).
>
> * * *
>
> "The defendant claims he acted in self-defense. (T. 582).
>
> * * *

"Under all the evidence it is for you to say whether the defendant's claim that the assault was committed justifiably and in self-defense can be sustained.

The burden of proof is not upon the defendant to establish the pleas of self-defense, but merely his duty to produce the proof which he relies on as showing his defense. That proof, of course, in this case is the statement the defendant made to policemen and he made to the policemen and he made to the District Attorney at the time. (T. 584).

The court then requested further requests to charge:

"MR. SIEGAL: I most respectfully ask this Court to instruct this jury that, if they have a reasonable doubt as to whether or not the blows which the defendant said he struck caused death, they must acquit.

"THE COURT: I so charge". (T. 594-95).

The jury found petitioner guilty of manslaughter in the first degree.

At the sentencing, the district attorney stated:

"And I will say this: Were it not for the skillful trial work of Mr. Siegal I think Your Honor might agree with that there never would have been two disagreements in this case. However, I don't think any consideration should be shown this defendant at all.

"THE COURT: I sat during the trial, the last trial, Mr. Siegal. The facts were quite evident. I do wish to commend you personally upon the three trials you had in this case.

"MR. SIEGAL: Thank you.

"THE COURT: Upon the loyalty and devotion that you have given to your client. You have gone beyond what a lawyer normally could be expected to do to attempt to protect this man's interests".*

The Direct Appeals

The issues presented to the Appellate Division and the Court of Appeals are set forth by the Court of Appeals in 8 N Y 2d at 866:

"In the Court of Appeals, defendant argued that the prosecutor, in his summation, deprived him of a fair trial by characterizing a written statement as a confession and by reading the statement to the jury despite the fact that neither the stenographer's notes thereof nor a transcript thereof, while read into the record, were admitted as exhibits; that the court in its charge incorrectly stated defendant's versions of what occurred and erred in refusing to grant

* Minutes of Sentence, pp. 3-4, Appellant's Supplemental Appendix. Petitioner himself apparently continued to be impressed with Herbert Siegal's defense work since Mr. Siegal represented him on his appeal of his rape conviction. 22 N Y 2d at 659.

> a request to charge; that the court erred in denying a post-trial motion for a new trial upon the ground of a juror's undisclosed bias, and that the People failed to proved his guilt beyond a reasonable doubt".

The State Habeas Corpus Petition

In his "Verified Petition for a Writ of Habeas Corpus" sworn to December 11, 1962 (A. 26-32)* petitioner's sole challenge was to the procedure by which his guilty plea was withdrawn at some time before the third trial. No mention was made of the admission used at trial.

The hearing in the Cayuga County Court (Hewitt, J.) January 10 and January 24, 1963, determined only the nature of the procedure by which petitioner's guilty plea was withdrawn. (A. 33-54). The court dismissed the writ in a decision dated March 4, 1963 (A. 55-57) after finding that petitioner was present in court when his plea was withdrawn. The order was affirmed on appeal, 31 A D 2d 1007 (4th Dept.), lv. to app. den. 24 N Y 2d 740 (1969).

* Numbers preceded by "A" refer to Appellant's Appendix.

The Federal Habeas Corpus Petitions

Petitioner's first application for a writ of habeas corpus in the Southern District, sworn to September 9, 1971 (A. 15-20) alleged that his guilty plea was withdrawn without his consent, that he was subject to double jeopardy and that he was denied the assistance of counsel at the state habeas corpus hearing. No mention was made of the voluntariness of his admissions. Judge Cannella denied the writ in a decision dated May 16, 1972 (A. 21-25). This Court denied a certificate of probable cause on February 21, 1973.

Petitioner's second application for a writ of habeas corpus in the Southern District, the subject of this appeal, again alleged that his guilty plea should not have been withdrawn, that he was denied the effective assistance of counsel, apparently in relationship to the plea withdrawal, that his arrest was without probable cause and that he was denied the right to appear before the grand jury. (A. 9-14). Contrary to the claim in petitioner's brief to this Court that he alleged below that his confession was involuntary (Appellant's brief, p. 3), there is nothing in the petition, no matter how liberally construed, that can be read to make that allegation.

The petition was denied by Judge Cannella in an opinion dated July 12, 1973 (A. 3-6).* Motion to reargue was granted and the prior decision adhered to in a Memorandum dated August 8, 1973 (A. 7-8).

ARGUMENT

THE QUESTION OF THE VOLUNTARINESS OF PETITIONER'S CONFESSION WAS NOT PRESENTED TO THE DISTRICT COURT AND IS NOT PROPERLY HERE. HOWEVER, IN ANY EVENT, RELIANCE UPON THAT CONTENTION IS PRECLUDED BECAUSE PETITIONER DELIBERATELY BYPASSED HIS STATE REMEDIES IN NOT CHALLENGING THE CONFESSION AT THE TRIAL OR IN ANY OTHER PROCEEDING.

Since the question of the voluntariness of petitioner's "confession"** was not presented to the District Court, notwith-

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* Judge Cannella found petitioner responsible for the withdrawal of the plea, that he was represented by competent counsel, and that his other claims where without merit.

** For the first time in this Court, petitioner argues about his "confession", when throughout his trial and his direct appeals, he insisted that his statements or conversation with the detectives could in no way be considered a confession. In his petition to the District Court, he claimed that his sentence was unduly harsh in part because of his "admissions". (A. 10, n).

standing petitioner's statement to the contrary (Appellant's brief, p. 3), the issue is not properly before this Court. United States ex rel. Robinson v. Vincent, 506 F. 2d 923 (2d Cir. 1974); United States ex rel. Springle v. Follette, 435 F. 2d 1380, 1384 (2d Cir. 1970) cert. den. 401 U.S. 980 (1971).

However, because the record before this Court demonstrates conclusively that petitioner deliberately bypassed the state procedures for determining the voluntariness of his confession, any direction for an evidentiary hearing is not justifiable. United States ex rel. Terry v. Henderson, 462 F. 2d 1125, 1128 (2d Cir. 1972), and the petition should be dismissed by this Court.*

The question of the voluntariness of petitioner's admission was never presented to the state trial court, the state appellate courts, or the Cayuga County Court that considered petitioner's application for a writ of habeas corpus. See pp. 16-17 ante. Notwithstanding petitioner's allegation now that he could not adequately represent himself at the habeas

* In his brief to this Court, petitioner implies error on the past of the District Court for not having considered the voluntariness issue. No matter how liberally the petition was construed, it would have been virtually impossible to construe that claim from the face of the petition.

corpus hearing, the court dealt with the arguments offered by the respondent. It was in no way obligated to or able to consider sua sponte any claim that petitioner might conceivably raise twelve years later.* See Picard v. Connor, 404 U.S. 270, 277 (1971).

In any event, petitioner is precluded from challenging the voluntariness of his admissions in the state courts at the present time since he did not object to their introduction at trial and the trial court did not charge the jury on the issue. People v. Huntley, 15 N Y 2d 72, 77 (1965).

It is mere cavil to suggest that petitioner did not deliberately bypass all state procedures for contesting the voluntariness of his confession. United States ex rel. Terry v. Henderson, supra, and United States ex rel. Cruz v. LaVallee, 448 F. 2d 671 (2d Cir. 1971), cert. den. 406 U.S. 958 (1972) are on all fours with this case.

In Terry, the court found a deliberate bypass of state procedures to challenge the voluntariness of petitioner's

* There has never been any allegation that petitioner was in any manner mentally incompetent and thus incapable of minimal articulation of his claims. Petitioner was apparently employed as a baker at the time of the crime.

confession not only because his counsel made no objection at trial but also because it was the consistent strategy of trial counsel to use the confession to support the petitioner's testimony that he lacked any premeditated intent.

In Cruz, where the trial had occurred prior to Jackson v. Denno, 378 U.S. 368 (1964), the petitioner failed to object at trial to an allegedly coerced confession. Since the record of the state trial revealed a deliberate bypass of any right to question the voluntariness of the confession, the court held that the state prisoner was therefore barred from raising the issue in the federal courts.

In Cruz, "it was the deliberate and consistent trial strategy of the defense not to question the voluntariness of the defendant's confession which was admitted into evidence against him." 448 F. 2d at 673. The defense consistently admitted the facts in the confession and attempted to demonstrate factors in mitigation of the killing. The court also held that defense counsel's choice of trial strategy was binding on the defendant short of exceptional circumstances or short of defense counsel's being so incompetent as to deprive the defendant of the effective assistance of counsel.

The only distinctions between Terry and Cruz and petitioner's case is that Terry and Cruz at least attempted to present their claims to the state courts, and Terry and Cruz, unlike petitioner, took the stand in an attempt to present their own versions of events. Petitioner's entire case at trial was constructed from the facts that he admitted to the detectives who testified. The only means that petitioner used to present his defense was the testimony of the detectives to whom he admitted the facts. See pp. 10-15, ante. Petitioner, did not testify, even to contest the voluntariness of his admission, although he did testify at one of the earlier trials. See 9 A D 2d at 878.

There is no question that Herbert Siegal was competent. He represented petitioner at all three trials and was commended for his dedication and skill by the prosecutor and the court when petitioner was sentenced. See pp. 15-16, ante. Petitioner apparently thought him competent, too, since he employed him once again when he was tried for rape after being paroled on the manslaughter conviction. Moreover, petitioner clearly consented to the use of this trial strategy since Mr. Siegal must have used this or similar strategy on the two previous trials. There was no reason to change strategy after two hung juries. And there could have been no reason for petitioner to have objected.

In addition, Mr. Siegal was aided by two other attorneys at various times throughout the trial. And two more attorneys represented petitioner on his state appeals. See p. 3, ante. They, too, did not raise the issue of the voluntariness of petitioner's admission, and to the contrary, based the appeals on the truth of those admissions. See 9 A D 2d at 877 and 8 N Y 2d at 866.

The record thus demonstrates conclusively that petitioner's defense strategy was not only based on the facts contained in his admissions but that he presented his defense solely through the testimony of the detectives to whom he had made his "admissions". He thus deliberately bypassed the state procedures for challenging the voluntariness of his admissions. That bypass precludes the petitioner from raising the issue in the federal courts.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
May 12, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
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SAMUEL A. HIRSHOWITZ
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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 12th day of May , 1975 , she served the annexed upon the following named person :

BONNIE P. (WINAWER) JOSEPHS, ESQ.
575 Madison Avenue
New York, New York

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Mary Ko

Sworn to before me this
12th day of May , 1975

David L. Birch
Assistant Attorney General
of the State of New York

Dept